1968

Barbara Mcwilliams, et al. v. Olympia Sales Company, a Corporation, and State Insurance Fund : Defendant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

BARBARA McWILLIAMS, et al.,
Plaintiffs and Appellants,

vs.

OLYMPIA SALES COMPANY, a corporation, and STATE INSURANCE FUND,
Defendants and Respondents.

Case No. 11043

DEFENDANT'S BRIEF

PETITION FOR REVIEW OF DECISION AND ORDER OF THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH

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STATEMENT OF FACTS

Sterling C. McWilliams filed an application for hearing to settle an industrial claim on November 23, 1964. In this application he claimed compensation for a basal skull fracture (R. 4). The defendants denied liability. Subsequent to said denial the parties entered into a stipulation and left to the Industrial Commission the determination of the question whether or not, at the

time of the accident, that occurred on July 22, 1964, Mr. McWilliams was an employee or an independent contractor. An order was entered by the Industrial Commission dated December 17, 1964 (R. 18 and 19) wherein the Industrial Commission stated as follows:

> "One issue to be resolved is the relationship between applicant and the defendant, namely, was the applicant an employer or a subcontractor?"

The Commission found that on July 22, 1964 Mr. McWilliams was an employee of the defendant, Olympia Sales Company. The Commission held that the applicant's injuries sustained on that date arose out of and in the course of his employment, and further required the defendants to "pay all medical and hospital bills incurred as a result of the accidental injury." The order left open the question of permanent disability of the applicant (R. 19).

This order of December 17, 1964 did not determine the extent of injury nor did it set forth a basis that the applicants in this case, Barbara McWilliams, et al., were entitled to death benefits. This point was made clear by the Industrial Commission in its order dated September 23, 1965 (R. 93) wherein the Industrial Commission held as follows:

> "The Commission order of December 17, 1964 does not determine that the death of Sterling McWilliams on March 9, 1965 was caused by the injury of July 22, 1964."

After the order of December 17, 1964, Sterling McWilliams, on January 14, 1965, requested a change of doctors, asking for permission to see a chiropractor (R. 21). Dr. Birdsley, a chiropractor, reported on January 22, 1965 that Mr. McWilliams had received four adjustments and that progress to that date was normal. He commented further that Mr. McWilliams "was elated" because of the favorable progress that he had noted in his condition (R. 24).

The record indicates that the Industrial Commission's and the defendants' first knowledge of difficulties relating to a heart condition was Dr. Evans' report (R. 20, 25, 26 and 27) which was dated and received in January 1965.

On February 25, 1965, Mr. McWilliams was examined at the request of the defendant, the State Insurance Fund, by Dr. L. E. Viko. Dr. Viko, in his report to the Insurance Fund, noted that he examined Mr. McWilliams on February 25, 1965, and based upon this examination and after discussion with his treating physician Dr. Evans, Mr. McWilliams left for the hospital promptly for the insertion of a cardiac pacemaker (R. 36). The pacemaker was surgically implanted on February 26, 1965, by Dr. Russell M. Nelson and the day subsequent to his discharge from the hospital on March 3, 1965, he died at his home.

On the 15th day of March, 1965, the applicants, Barbara McWilliams and her children through their attorney, filed an application to settle an industrial

accident, claiming death benefits, alleging that the basal skull fracture which occurred on July 22, 1964 caused the death of McWilliams (R. 42).

The defendants denied any liability for the death of Mr. McWilliams and stated, "This case involves medical questions and so we respectfully suggest that it be referred to a medical panel." (R. 55) The Industrial Commission appointed a medical panel pursuant to the provisions of 35-1-77 U.C.A. 1953, as amended (R. 59).

The record is clear that both the applicant Barbara McWilliams and her attorney received notice of the appointment of the medical panel (R. 59). The letter of appointment was directed to Dr. L. E. Viko asking him to serve along with Dr. Crockett and Dr. Kilpatrick. No objection was raised by the applicant to the appointment of Dr. Viko. The panel filed its report on July 22, 1965. It was specifically stated in this panel report that the file of Dr. Viko's examination of February 25, 1965 was attached and circulated to the members of the panel (R. 73). The panel report found that the cause of death was due to a cardiac failure and was brought about by ventricular fibrillation occurring in spite of the pacemaker. The panel report discussed the possibility of whether or not Mr. McWilliams 'exposure to lacquer fumes on July 22, 1964 and the fall contributed to the death: and, concluded that it had not. In reviewing this problem the doctors turned to experts who had studied the effects of exposure to

fumes of this nature. In addition, the U. S. Public Service Department was contacted in regards to their conclusions in this matter. All of these reports were made a part of the industrial file. It was the opinion of the panel that there was no association between the lacquer exposure and the heart disease that caused the death of Mr. McWilliams.

Pursuant to the procedure of the Industrial Commission, copies of the medical panel report were circulated to all concerned parties. The applicants, within the statutory time, objected to the report of the medical panel on numerous grounds and for numerous reasons. At this point no objections were filed by the applicant to the appointment of Dr. Viko by the Industrial Commission to the panel and to the procedure used by the panel in arriving at its conclusions (R. 83, 84 and 85).

Subsequent to objecting to the medical panel report, the applicants filed a Motion asserting that the December 17, 1964 order was "res ajudicata" and that the applicants were entitled to death benefits. The Commission, in response to this motion, denied the same and stated that the December 17, 1964 order did not determine the issue of the cause of Mr. McWilliams' death and set a hearing based upon the applicants' objections to the medical panel report (R. 93). After this matter had been continued at the convenience of applicant and not until the matter was set for hearing did the applicant raise the issue that the medical panel report was objected to on the grounds that Dr. Viko had sat on the same (R. 99).

Prior to the hearing on the objections to th
report, the applicant took the depositions of D
ton and Dr. David, who reside in Boise, Idah
applicants' brief on file herein quotes at lengt
the depositions of these doctors. In summary, D
ton, who is a specialist in orthopedic surgery, co
that Mr. McWilliams' death was due to the f
occurred on July 22, 1964. Dr. David, who is a
practitioner at Boise, Idaho, testified that in his
Mr. McWilliams' death was due to the injury
on July 22, 1964. Dr. David felt that both the
the exposure to the lacquer fumes concurrently
about the death of Mr. McWilliams.

Subsequent to the taking of these deposi
hearing was held on the objections to the medical
report heretofore filed when Dr. Viko was sit
chairman. Prior to this time Dr. Viko had di
Dr. Kilpatrick appeared on behalf of the pan
Kilpatrick testified that in his opinion there was
nection between the lacquer exposure and the
heart disease that the deceased had in this pa
case. He testified that in his opinion there
connection between the fall that Mr. McW
had experienced and the resulting problems of hi
He further testified that the combination of
these factors did not contribute to the death (
266).

The applicant at this time introduced into e
testimony from friends and relatives of Mr. M
liams that described his fainting subsequent to

and his prior good health. Also, testimony was introduced by a chiropractor in the form of a written report as to his findings prior to the death of Mr. McWilliams. Dr. Kilpatrick had an opportunity to sit through the entire hearing and was recalled as the last witness. He was asked specifically whether or not the testimony tendered, in any manner, varied his opinion as to the cause of Mr. McWilliams' death. The Doctor testified that in his opinion no additional facts had been added which would alter his conclusions and opinions (R. 312, 313).

After this hearing the Industrial Commission felt it appropriate to appoint another medical panel. Forwarded to the new panel was all factual information presented by the applicants including all medical reports (such as the treating chiropractor's) and the depositions of Dr. Burton and Dr. David. This panel was appointed pursuant to a letter of August 3, 1966. No objections were registered by either party to this procedure.

35-1-77 refers to 35-2-56 U.C.A. 1953, as amended, in setting forth the qualifications of the doctors that serve on the medical panel. It states that the appointment should be made of not less than three physicians specializing in the treatment of the disease or the condition involved in the case. In this particular case the second medical panel consisted of six specialists.

This panel filed its report on October 12, 1966. The medical panel report, in essence, found that:

> "It is highly probable that Mr. McWilliams had organic heart disease involving the conductive system of the heart which ante-dated his fall and alleged accident and which was responsible for the fall and the subsequent progression of the heart disease leading to his death. Further, the panel finds no evidence that the inhalation of lacquer fumes, as alleged, was responsible for the heart disease or its consequences." (R. 35)

It was the opinion of this panel,

> "that it is highly probable that Mr. McWilliams had organic heart disease which ante-dated his fall and injury of July 22, 1964, and, that it was the natural progression of the pre-existing heart disease which led to his eventual death on March 4, 1965." (R. 347)

It should be noted that the panel took into consideration the testimony tendered by the applicants' doctors, Dr. Burton and Dr. David. The applicant objected to the report of the medical panel and pursuant to said objections a hearing was held on March 1, 1967 in which Dr. Orme, one of the members of the panel, was present.

The applicant on cross-examination of Dr. Orme extensively questioned him concerning the panel's reliance on statements made in hospital records in regards to evidence of dizzy spells, claiming that this evidence was mere hearsay. The doctor, however, testified that such evidence had no real effect in the ultimate conclusion.

"Q In other words, your opinions would be the same if there was no evidence at all that he had ever had any dizzy spells?

A Yes sir." (R. 377)

The Industrial Commission filed Findings of Fact, Conclusions of Law and Award on August 14, 1967, finding that the applicants were not entitled to receive death benefits by reason of the accident that occurred to Mr. McWilliams on July 22, 1964.

POINT I

THE INDUSTRIAL COMMISSION DID NOT ERR IN FINDING THAT THE APPLICANT WAS NOT ENTITLED TO ANY BENEFITS BY REASON OF THE ACCIDENT TO MR. McWILLIAMS ON JULY 22, 1964.

The applicant in her first sentence in her brief under Point I properly states the issue to be decided by this Court when she states as follows:

> "The principle we contend is the controlling factual issue in this case is whether or not the heart malfunction of McWilliams was directly related to or caused by the fall McWilliams received on July 22, 1964, it having been previously determined that McWilliams was acting in the course and scope of his employment with the defendant Olympia Sales Company at the time of the fall".

The applicant quotes in her brief the first medical panel report (R. 73) in part and infers that the panel con-

sidered only two possibilities as a cause for the cardiac death. She then urges that by finding that the death was caused by a pre-existing condition as opposed to the circumstances surrounding the accident of July 22, 1964 that the findings of the panel were entirely negative. The position of the applicant, in essence, is that this Court should believe the applicant's experts as opposed to the panel's conclusions. The Hearing Examiner in this case noted the discrepancy in opinions of the physicians that had testified and stated as follows:

> "The hearing examiner is more persuaded on the disputed medical facts by the expressed opinion of the medical panels which consisted of a total of seven internists and cardiologists and one neurologist. The evidence of the applicant came from a general practitioner and an orthopedic surgeon. I am not persuaded necessarily by numbers, but the qualifications of the Commission's special medical panel are undisputed, and their conclusions must not be disregarded." (R. 386).

The record in this case consists primarily of examination and cross examination of medical witnesses. It is interesting to note that the appellant in urging this Court to disregard the panel's conclusions and adopt the opinion of her experts fails to note that even her experts disagree as to the cause of death in this matter. On cross examination, Dr. Burton testified as follows:

> "Q Dr. Burton, I want to be sure I understand your testimony. Is it not your position that the cause of the death of Mr. McWilliams was

caused—I am not talking about causal connection, which came first, the egg or the chicken—I am talking about caused by the fall rather than a contribution of the exposure of lacquer fumes and the fall?

"A No. I feel that the lacquer fumes caused that original attack of syncope which caused the call and the sequence from there on is all in the record.

"Q Therefore, you do not feel that the exposure to the lacquer fumes directly affected the heart?

"A Except on a temporary basis, no.

"Q And had no appreciable lasting effect as far as what progressed later when talking about directly affecting the heart?

"A No, I don't feel so—possible but to me not very probable.

"Q Then you agree with or disagree with Mr. David?

"A I probably do.

"Q You were here when he gave his testimony or the greater majority of it?

"A Yes.

"Q And you did understand that his position was that there were dual factors that is the direct and causal connection of the inhaling of the fumes of the lacquer which directly contributed to the disease of the heart along with the fall. Was that not his position?

"A I believe so.

"Q And you disagree with that?

"A Yes, pathologically there is no evidence of heart disease. It is a functional disease he died from rather than anything else." (R. 155, 156)

The issue presented in this appeal is not whether or not this Court should examine the voluminous medical records and testimony and decide whether or not to believe the applicants' experts as opposed to the medical panel's conclusions, but rather whether or not the Commission's holdings and order in this case is such, that the Commission's action can be said to be arbitrary and capricious. This Court has on many occasions been faced with the problem that is presented by appellants' theory in urging this Court to chose between the opinions of experts at an industrial hearing and to overturn the Industrial Commission's findings. It is agreed that plaintiff's doctors felt there was a connection between the injury arising out of the accident of July 22nd and the resulting death of Mr. McWilliams. There is no doubt, however, that there was contrary medical testimony that the death of Mr. McWilliams was not so related but was rather due to a pre-existing condition.

This Court has pointed out in *Vause v. Industrial Commission,* 17 Utah 2d 217, 407 P. 2d 1006, that our "statutory and decisional law require us to look at the evidence in the light most favorable to the Commission's finding and it is the obligation of the parties involved to so present the matter to the Court."

It is respectfully submitted that the applicant in this case in quoting at length from her doctors' testi-

mony is rearguing a factual question that has been determined by the Commission and has set no basis for this Court to find that the Commission acted arbitrary and capricious.

It is fundamental that the findings of the Industrial Commission on conflicting medical testimony cannot be disturbed on appeal. As early as 1924 this Court in *Campbell v. Eagle and Blue Bell Mining Company*, 64 Utah 430, 231 Pac. 620, articulated the rule in cases of this kind and the Court stated as follows:

> "The testimony taken before the Commission consists entirely of the opinions of medical experts with the exception of the testimony of the applicant, Campbell. This testimony is conflicting. We can see nothing in this record for review except the findings of the Commission based upon conflicting testimony. The testimony was competent and material to the issues to be determined by the Commission, and on that testimony the Commission made its findings. This court, in proceedings of this character, is without power to disturb the findings of the Commission based upon competent conflicting testimony. The statute so provides, and the court has so decided in numerous opinions. It is wholly immaterial that this court, or the individual members thereof, might have come to a different conclusion than that reached by the Commission. The Commission's findings are binding when supported by competent, material testimony."

Also see *Kent v. Industrial Commission*, 89 Utah 381, 57 P. 2d 724 and *Kavalinakis v. Industrial Commission*, 67 Utah 174, 246 Pac. 698.

A rather recent Utah case facing the issue of a pre-existing condition as being the cause for the disability as versus an accident is *Thompson v. Industrial Commission,* 19 Utah 2d 129, 427 P. 2d 394. That case presented a fact situation where the Industrial Commission adopted the medical panel report. The medical panel report stated that there was "no good evidence that the alleged injury on or about July 17, 1964 had any relationship . . ." with the accident in question. The applicant in that case attacked the Commission's order on appeal in essence on the same grounds that the appellant is now urging on this Court. For example, the applicant argues on page 7 of her brief that there was "no evidence" of heart disease which pre-existed the fall and further they argue that the autopsy does not corroborate the theory that there was a pre-existing condition. The doctors in sustaining the medical panel report recognize this fact and have repeatedly pointed out the same in both their reports and testimony and notwithstanding this lack of evidence find in their opinion that there is no connection between the accident in question and the resulting cardiac death. On page 30 of her brief the appellant urges that the testimony of the plaintiffs' doctors as versus the panel's doctors should be believed because one may relate "common sense and experience with life." As stated earlier, this was the same argument that was made by the applicant in *Thompson v. Industrial Commission, supra.* The court, however, held as follows:

"It appears that the Commission based its decision upon the conflicting medical opinions. We must conclude that the order was based upon competent evidence. There is nothing in the record to indicate that the Commission acted capriciously or arbitrarily".

Citing *Campbell v. Eagle and Blue Bell Mining Company, supra.*

As mentioned earlier, the panel fully recognized that there was no objective evidence in regard to a pre-existing condition. In regard to this issue, however, the panel stated as follows:

"The panel reviewed and discussed, with interest, the information in the file concerning the possible causal relationship between the inhalation of the lacquer fumes and Mr. McWilliams' fall and head injury and the possible relationship of these events to his heart block and subsequent death . . .

"The panel recognizes and notes the fact that the file contains statements of several individuals which attest to Mr. WcWilliams excellent health and lack of symptoms related to his heart or nervous system prior to his alleged accident. Moreover, the panel recognizes that the previous medical panel and the pathologist who performed the autopsy on Mr. McWilliams found no evidence of significant organic disease of the heart or nervous system prior to the insertion of the electrical pace making device. The panel agrees with other opinions contained in the file that it is regrettable that no detailed information seems to exist concerning Mr. McWilliams cardiac or nervous system status prior to July 22, 1964.

> In spite of the above considerations, it is the opinion of the present panel that it is highly probable that Mr. McWilliams had organic heart disease which ante-dated his fall and injury on July 22, 1964, and, that it is the natural progress of the pre-existing heart disease which led to his eventual death on March 4, 1965."

The argument used by plaintiffs in this case was also urged upon this Court in a recent decision entitled *Mellen v. Industrial Commission,* 19 Utah 2d 373, 431 Pac. 2d 798, in which this Court sustained the Commission's order in adopting the medical panel report. In the *Mellen* case the appellant complained that the medical panel was using an improper criteria and was failing to examine other evidence and as such the award of the Commission should be reversed. The court held that the Commission did not err in adopting the panel report and cited *Garner v. Hecla Mining Company,* 19 Utah 2d 367, 431 P. 2d 794, which held:

> "The insuperable difficulty in plaintiff's attack on the Commission's finding is that they improperly attempt to focus consideration of the issues exclusively upon their own view of the evidence and theories of the case. While some aspects of the statistical data and medical theories harmonized with their contention, others failed to do so . . . Consistent with the foregoing and corroborating the existence of unknown factors and uncertainty as to causation, is the report of the medical panel to which this case was referred for examination: 'We cannot confirm that the lung carcinoma was caused by exposure to uranium mining occupation.' There

is thus a reasonable basis in the evidence for the refusal of the Commission to find in accordance with the plaintiff's contention. Upon the principles stated above it is our duty to affirm the decision."

It is respectfully submitted, therefore, that the appellant in this case is asking this Court to discount the two medical panels that were heretofore appointed and to adopt the testimony tendered on behalf of the applicant. As stated above, the doctors supporting the medical panel's report conclude that Mr. McWilliams' death was not due to the accident in July 1964, but rather was due to a pre-existing condition. Certainly, there is a reasonable basis in the evidence for the refusal of the Commission to find in accordance with the plaintiff's contention.

POINT II

THE COMMISSION'S ORDER CANNOT BE OVERTURNED ON THE GROUNDS THAT THE COMMISSION FAILED TO SUBMIT THE MEDICAL ASPECTS OF THE CASE TO AN IMPARTIAL MEDICAL PANEL.

There is no doubt that Dr. L. E. Viko, Chairman of the first medical panel, examined the applicant Sterling McWilliams for the defendant, the State Insurance Fund. It should be noted, however, that the objection, that Dr. Viko should not have been a member of the medical panel, was not raised by the applicant timely. The record is clear that prior to Dr. Viko's sitting on

the first medical panel, Barbara McWilliams and her attorney received notice of the appointment of the medical panel and the fact that Dr. Viko was going to sit as chairman (R. 59). There was no objection raised at this time by the applicant to the appointment of Dr. Viko. The panel report clearly showed that Dr. Viko had examined the patient and that his findings were contained as part of the industrial report (R. 73). After the panel report was filed, the applicant objected to the medical panel. However, she did not object to the fact that Dr. Viko sat as chairman on said panel (R. 83, 84 and 85). It was not until after the matter had been set for hearing, based upon the objections, did the applicant raise the issue that the medical panel report was void for the reason that Dr. Viko had sat on said panel (R. 99). The first notice therefore that the applicant disagreed to this matter was after the time set for the hearing on the objections.

Even assuming that the applicant had not waived her right to this objection by waiting until after the results of the panel decision were made, it appears that the point is academic. After this objection was raised a new medical panel was appointed. No objection was made to the appointment of the new medical panel nor the information that was contained in the file that they were to consider. Therefore, even assuming that the Commission did not act wisely in allowing Dr. Viko to sit on the medical panel, certainly the appointment of a new and impartial medical panel would correct this error, if there was one.

POINT III

THE DEFENDANTS WERE NOT ESTOPPED FROM DENYING LIABILITY FOR APPLICANT'S DEATH BENEFITS.

Plaintiffs' introductory sentence in her brief under Point III is not accurate. Plaintiff states "After Decedent's initial treatment by Dr. Karowites (sic) on July 22, 1964 all medical examinations and treatment was performed and administered by physicians authorized and compensated by the employer's surety, State Insurance Fund." The only evidence in regard to the question of authorization and compensation was the testimony taken on July 6, 1966 when counsel for the plaintiffs called Mr. Kirkham, Chief Claims Adjuster for the State Insurance Fund. This witness made it clear (R. 306) that the defendant, the State Insurance Fund, did not authorize any treatment for the decedent in this case. Further, the defendants did not compensate Dr. Evans, the decedent's doctor (R. 310, 311, 317). Mr. Kirkham did explain that if a claimant is desirous of changing doctors after the initial treatment, then the authority must be received by the Industrial Commission, not the State Insurance Fund. The premise, therefore, for plaintiff's argument that all medical examination and treatment was authorized and compensated by the employer's surety, the State Insurance Fund, is not true and, in fact, this assertion is contrary to the evidence.

The plaintiff in her second paragraph under Point

111 seems to indicate that the defendant, the State Insurance Fund, had notice of the decedent's heart condition prior to December 7, 1964. The record is clear, however, that the first notice of any difficulty in regard to heart disease was the surgeon's report which was filed January 8, 1965. This was some time after the stipulation in regard to the issue, of whether or not Mr. McWilliams was an employee, was submitted to the Commission and almost a month after the Commission had set forth its Order of December 17, 1964. The first formal report from Dr. Evans as to the type of treatment and the decedent's difficulties was a report dated January 25, 1965 and received by the Industrial Commission on March 25, 1965 (R. 25). The applicant, Mr. Sterling C. McWilliams, informed the Industrial Commission that he was being treated by Dr. Evans on January 14, 1965, in which he made a request to the Industrial Commission that he be allowed permission to seek the services of a chiropractor (R. 21).

It is clear, therefore, that plaintiff's basis for alleging an estoppel is based upon factual considerations that are not accurate. In the first place, the defendant did not authorize and afford compensation for treatment for heart disease; secondly, there is no evidence that the defendant had any knowledge of the difficulties of the applicant in regard to cardiac disease until subsequent to the Commission's order of December 17, 1964.

The Commission's order of December 17th, 1964 did not make a determination that Sterling McWil-

liams' incapacity was caused by the injury of July 22, 1964. The order of the Commission was that the defendant pay all medical and hospital bills *incurred as a result of the accidental injury* (R. 19). At the time the order was entered by the Commission the only knowledge of injuries was the claim for compensation based upon a basal skull fracture. On February 25th the applicant was examined by Dr. Viko (R. 34). Dr. Viko, sensing an emergency, contacted Dr. Evans and the defendant was admitted immediately to the hospital because of the emergency situation.

The plaintiff cites as authority 100 C.J.S. §657. This encyclopedia, however, in regard to the issue of res judicata sets forth generally two classifications where matters are held to be res judicata and where matters are held not to be res judicata. The text states that matters are res judicata as to facts on which jurisdiction depends, i.e., employment of the employee, the relationship between the parties, etc. (100 C.J.S. §657, p. 991). It is stated, however, on page 992 that under the circumstances of this case the order of December 17, 1964 was not res judicata:

> "*Matters held not res judicata.* Under a statute authorizing a revision because of change of condition, an award is not a final adjudication as to the degree of injury sustained."

It should be pointed out that Utah has such a statute. See 35-1-78, U.C.A. 1953, as amended, which provides in essence that the power and jurisdiction of the Industrial Commission is a continuing one and the Com-

mission has authority to make such modification or changes as in its opinion may be justified. The Utah cases construing this statute have articulated the right of the Industrial Commission to modify a decree when there has been a change of circumstances. See *Salt Lake City v. The Industrial Commission,* 61 Utah 514, 251 Pac. 1047; *Carter v. The Industrial Commission,* 76 Utah 520, 290 P. 2d 776. Our court has also spoken to the issue of res judicata and has held that the doctrine of res judicata which is applicable in a court proceeding is not in the strict sense applicable to proceedings before an Industrial Commission, *Spencer v. Industrial Commission,* 4 Utah 2d 185, 290 P. 2d 692.

100 C.J.S., §657, 993, sets forth the applicable law in cases of this kind when it states as follows:

> "Where an injured employee files a claim for an injury and the Commission is not advised that he had received a second injury and the hearing is limited solely to the first injury, the order of the Commission goes only to the first injury and thereafter the Commission may hear and determine claimant's right to compensation for the second injury . . . In order for the doctrine of res judicata to apply, the subject matter of the second proceeding must be the same; and so, although a view to the contrary has been taken, it has been held that a wife applying for compensation for the death of her son is not bound by findings in her prior proceedings for compensation for the death of her husband in the same accident that she was wholly dependent on the husband, which findings were based on the statutory presumption to that effect." Citing *Utah*

Fuel Company v. Industrial Commission of Utah, 67 Utah 25, 245 Pac. 381.

It is defendant's position, therefore, that the order of December 17, 1964 did not speak to the issue of whether or not the basal skull fracture caused the cardiac problem; secondly, that the Commission's order specifically limited its award to injuries caused by the accident; further, that the doctrine of res judicata is not applicable in the State of Utah in matters of this kind (See 35-1-78, U.C.A. 1953, as amended, and the cases construing the same). Even if the doctrine of res judicata would be applicable, the applicant in this case cannot rely on this doctrine because she was a different party than the applicant in the original proceedings.

It is defendants' position that the two Utah cases in regards to this matter, that is *Taggart v. Industrial Commission,* 79 Utah 598, 12 P. 2d 356, and *Harding v. Industrial Commission of Utah,* 83 Utah 376 28 P.2d 182, clearly show that the defendant is not estopped in this case. In the *Taggart* case, *supra,* the issue presented was whether or not the hemorrhage to an ulcer in the right nostril was due to an accident or was a disease unrelated to compensation coverage. In that case it appeared that the surety had paid compensation for temporary total disability for a period from August 11th to Sepetmber 9th. The applicant claimed that the surety was, therefore, estopped from denying liability for the death. The Utah Supreme Court rejected this theory and held that the employer's insurance carrier's payment of compensation did not preclude it from denying

that the employee met with an accident causing death. Citing *Halling v. Industrial Commission,* 71 Utah 112, 263 Pac. 78.

The *Harding* case mentioned above clearly presents the proper rule as set forth in appellants' brief on page 39. The court found estoppel in that case. However, medical care had been furnished for over five years and, in fact, by making such payment the lapse of time was so great that the statute of limitations may have been successfully urged against any such action and as such the court found actual prejudice.

It is clear that the defendants are not estopped from denying liability in this matter since at the initial hearing no knowledge was had as to a cardiac problem; secondly, no treatment was paid for or authorized by the surety, and, the applicant was not misled nor prejudiced and thus the defendant is not estopped from denying liability.

CONCLUSION

The actions of the Industrial Commission in this case cannot be said to be arbitrary and capricious and as such the Commission's ruling should be sustained by this Court.

Respectfully submitted,

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